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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

CATHERINE NATALE et al., **Plaintiffs and Respondents,** **v.** **LEO B. SIEGEL,** **Defendant and Appellant.**	**A136379** **(Contra Costa County Super. Ct. No. MSC11-02757)**

A lawyer representing the defendants in a civil matter, who was himself a defendant in the litigation, filed a special motion to strike a cause of action for extortion under the anti-SLAPP statute (Code Civ. Proc., § 425.16),[1] arguing the conduct on which it was based arose from the constitutionally protected right to petition. The trial court denied the motion and, finding it frivolous, ordered all defendants (including the lawyer) to pay the attorney fees incurred by plaintiffs defending the motion. We affirm.

FACTS AND PROCEDURAL BACKGROUND

Plaintiffs and respondents Catherine and Frank Natale (collectively, plaintiffs) are breeders of Doberman Pinschers and sold a dog known as "Titan" to Rick and Tamara Dumas. Plaintiffs repossessed Titan, claiming the Dumases had not complied with the terms of the written sales agreement. Conflict between the two couples ensued.

[1] "SLAPP" is an acronym for strategic lawsuit against public policy. (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 85, fn. 1.) Further statutory references are to the Code of Civil Procedure unless otherwise indicated.

Plaintiffs filed this action against the Dumases and also named as a defendant appellant Leo B. Siegel, a lawyer who represented the Dumases in matters arising from their dispute with plaintiffs. The complaint included seven causes of action: stalking, assault, battery, trespass, breach of contract, declaratory relief and extortion.[2] Plaintiffs dismissed Siegel as a defendant from all but the extortion cause of action.

The claim for extortion was based on the following alleged facts: After plaintiffs regained possession of Titan, another Doberman Pinscher known as "Jackie," who belonged to their friend Jennifer Lee, was stolen. Siegel approached plaintiffs with a proposed "settlement agreement," under which plaintiffs would return Titan to the Dumases and give them $2,000, in exchange for which the Dumases would return Lee's dog. The written agreement proposed by Siegel also contained a $25,000 liquidated damages clause in the event any party failed to adhere to the terms of the settlement. Siegel provided plaintiffs with a copy of the proposed written settlement agreement, and sent the following email message to plaintiff Frank Natale: "Now finally, as to how you and Jennifer [Lee] can be assured that she will get her dog back, you should be aware that Jennifer herself trusts me as an 'honest broker' in this matter. Aside from that, all anyone needs to realize is that in completing the mutual release agreement, I, Leo B. Siegel, an attorney licensed to practice law in the State of California, who by grace of that fact, am an 'officer of the court,' say it will happen. . . . [¶] I urge you or someone else on your behalf, to go to Nevada tomorrow, or wherever else you may be housing the Dumases' dog, and to then permit and cooperate with the exchange of dogs proposed in the Mutual Release Agreement no later than the appointed time . . . at my office."

Siegel filed an anti-SLAPP motion under section 425.16, contesting the seventh cause of action for extortion. Although the motion named only the Dumases as the moving parties, the memorandum of points and authorities stated, "Defendant SIEGEL is expected to file an identical motion, but by stipulation . . . , his 60-day time limit to file

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[2] Although a copy of the complaint was not included in the record on appeal, the superior court has provided us with a copy and we order the record augmented to include the same. (Cal. Rules of Court, rule 8.155(a)(1)(A).)

that motion has been extended pending [plaintiffs'] submission of complete responses to discovery previously served on them." Before filing opposition to the motion, plaintiffs' counsel notified the lawyer who represented Siegel individually that he believed the motion was frivolous and would seek costs and attorney fees. Sigel did not withdraw the motion. The court denied the motion, finding "uncontradicted evidence of an act of extortion," which, under *Flatley v. Mauro* (2006) 39 Cal.4th 299 (*Flatley*), amounts to illegal conduct not protected by the anti-SLAPP statute.

Plaintiffs submitted a motion to recover $16,730 in attorney fees against defendants under sections 425.16, subdivision (c)(1) and 128.5, arguing the anti-SLAPP motion had been frivolous in light of *Flatley*. Siegel, represented by separate counsel, did not contest the amount of fees sought, but argued the motion had not been frivolous and in any event, section 425.16 did not authorize the recovery of fees against the moving party's lawyer. The court awarded the requested fees against all defendants, finding the anti-SLAPP motion to have been "frivolous, without merit and/or for the sole purpose of harassment" in light of *Flatley*. Siegel appeals the order awarding fees.

DISCUSSION

Section 425.16, subdivision (c)(1), provides, "[A] prevailing defendant on a special motion to strike shall be entitled to recover his or her attorney's fees and costs. If the court finds that a special motion to strike is frivolous or is solely intended to cause unnecessary delay, the court shall award costs and reasonable attorney's fees to a plaintiff prevailing on the motion, pursuant to Section 128.5." Siegel argues section 425.16 does not authorize an award of fees against a defendant's lawyer. We disagree.

The imposition of attorney fees as sanctions for a frivolous anti-SLAPP motion is mandatory. (*Moore v. Shaw* (2004) 116 Cal.App.4th 182, 198-199 (*Shaw*).) "The 'reference to section 128.5 in section 425.16, subdivision (c) means a court must use the procedures and apply the substantive standards of section 128.5 in deciding whether to award attorney fees under the anti-SLAPP statute.' [Citation.] Attorney fees under

section 128.5 may be assessed against a party, the party's attorney, or both." (*Id*. at p. 199, fn. omitted.)[3]

Siegel relies upon *Moore v. Kaufman* (2010) 189 Cal.App.4th 604 (*Kaufman*), in which the court held void a judgment requiring the *plaintiff's* lawyer to pay fees to a *defendant* who prevailed on an anti-SLAPP motion. "[N]othing in the statute's language suggests that, although the award against a losing plaintiff is mandatory, the court retains discretion to grant an award against the plaintiff's attorney as well." (*Id.* at p. 615.)

The *Kaufman* decision is not controlling because it did not involve attorney fees awarded as sanctions and construed only the first sentence of section 425.16, providing for mandatory fees for a prevailing *defendant*. (*Kaufman*, *supra*, 189 Cal.App.4th at p. 614.) Here, we are concerned with the second sentence of section 425.16, subdivision (c)(1), which addresses the fees that may be awarded to a prevailing *plaintiff* and makes the imposition of fees as sanctions mandatory when the anti-SLAPP motion was frivolous. (*Shaw*, *supra*, 116 Cal.App.4th at pp. 198-199.) The court in *Kaufman* specifically recognized a lawyer could be ordered to pay fees under section 128.5. (*Kaufman*, at p. 615.)

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[3] Section 128.5 provides in part, "(a) Every trial court may order a party, the party's attorney, or both to pay any reasonable expenses, including attorney's fees, incurred by another party as a result of bad-faith actions or tactics that are frivolous or solely intended to cause unnecessary delay. . . . [¶] (b) For purposes of this section: [¶] (1) 'Actions or tactics' include, but are not limited to, the making or opposing of motions or the filing and service of a complaint or cross-complaint only if the actions or tactics arise from a complaint filed, or a proceeding initiated, on or before December 31, 1994. . . . [¶] (2) 'Frivolous' means (A) totally and completely without merit or (B) for the sole purpose of harassing an opposing party."

Irrespective of its limitation to actions filed on or before December 31, 1994, "the procedures and standards of section 128.5 remain operative to guide the implementation of the attorney fee provision of section 425.16, subdivision (c)." (*Shaw*, *supra*, 116 Cal.App.4th at p. 199, fn. 9; *Chitsazzadeh v. Kramer & Kaslow* (2011) 199 Cal.App.4th 676, 683 (*Chitsazzadeh*); *Decker v. U.D. Registry, Inc.* (2003) 105 Cal.App.4th 1382, 1392, superseded by statute on other grounds, as stated in *Hall v. Time Warner, Inc.* (2007) 153 Cal.App.4th 1337, 1349.)

Moreover, Siegel was himself a defendant named in the seventh cause of action for extortion, at which the anti-SLAPP motion was directed. Siegel argues he should not be considered a moving party in the motion because he filed the motion only on behalf of the Dumases, and was himself precluded from participating as a defendant due to the court clerk's having erroneously entered a dismissal of all claims against him. Plaintiffs take issue with Siegel's characterization of his status in the litigation, but even if we assume he was precluded from filing his own anti-SLAPP motion at that juncture, he prepared the motion on behalf of the other defendants and stood to benefit if it was granted. Siegel was a moving party for all intents and purposes.

Siegel alternatively argues the fee award must be set aside because the motion was not "frivolous" under section 128.5, challenging the trial court's determination the motion was "without merit and/or for the sole purpose of harassment." We are not persuaded.

A frivolous action or tactic is defined in section 128.5 as one that is "totally and completely without merit" *or* "for the sole purpose of harassing an opposing party." (§ 128.5, subd. (b)(2).) "A motion is totally and completely without merit . . . only if any reasonable attorney would agree that the motion is totally devoid of merit. [Citation.] This is an objective standard. Whether the sole purpose of the motion is to harass an opposing party or the motion is solely intended to cause unnecessary delay, in contrast, concerns the subjective motivation of the moving defendant. [Citation.] The moving defendant's subjective motivation can be inferred from the absence of any arguable merit. [Citation.] We review a finding under section 425.16, subdivision (c)(1) that a special motion to strike was frivolous or solely intended to cause unnecessary delay for abuse of discretion." (*Chitsazzadeh, supra*, 199 Cal.App.4th at pp. 683-684; see also *Gerbosi v. Gaims, Weil, West & Epstein, LLP* (2011) 193 Cal.App.4th 435, 450.)

In denying the anti-SLAPP motion, the trial court relied primarily on *Flatley, supra*, 39 Cal.4th at page 317, in which the Supreme Court concluded "section 425.16 cannot be invoked by a defendant whose assertedly protected activity is illegal as a matter of law and, for that reason, not protected by constitutional guarantees of free speech and

petition." The plaintiff in *Flatley* was an entertainer who brought a suit for civil extortion and related causes of action against a lawyer representing a woman who claimed the plaintiff had raped her. (*Id*. at pp. 305-311.) The extortion claim was based primarily on a letter threatening to publicly accuse the plaintiff of rape and to report the alleged crime to law enforcement unless the plaintiff "'settled'" by paying a sum of money, later specified to be in the "'seven figures.'" (*Id*. at p. 329.) Noting that attorneys are not exempt from extortion claims (*id*. at p. 327), the court concluded the threat to publicly accuse the plaintiff of rape unless a substantial amount of money was paid constituted extortion as a matter of law. (*Id*. at pp. 330-333.) The litigation privilege of Civil Code section 47, subdivision (b), while possibly providing a substantive defense to the extortion claim, did not limit the scope of the anti-SLAPP statute: "The fact that Civil Code section 47 may limit the liability of a party that sends to an opposing party a letter proposing settlement of proposed litigation does not mean that the settlement letter is also a protected communication for purposes of section 425.16." (*Id*. at p. 325, fn. omitted; see also pp. 323-324.)

In light of *Flatley*, the trial court did not abuse its discretion in determining the anti-SLAPP motion in this case was totally and completely without merit and, inferentially, made for the sole purpose of harassing the other side. It was uncontested Siegel advised the plaintiffs they could secure the return of Jackie, their friend's stolen dog, by providing defendants with the dog Titan plus $2,000. Based on this conduct, plaintiffs brought a civil claim against Siegel for extortion. Extortion is defined in the Penal Code as "the obtaining of property from another, with his consent . . . induced by a wrongful use of force or fear. . . ." (Pen. Code, § 518.) "Fear, such as will constitute extortion, may be induced by a threat . . . [¶] 1. To do an unlawful injury to the person or property of . . . a third person[.]" (Pen. Code, § 519.) The "'belief that the victim owes a debt is not a defense to the crime of extortion.'" (*Flatley, supra*, 39 Cal.4th at p. 327, quoting *Gomez v. Garcia* (9th Cir. 1996) 81 F.3d 95, 97.)

The trial court reasonably concluded Siegel's conduct, if proved, would amount to attempted extortion. (Pen. Code, §§ 523, 524.) The dog Jackie was property owned by a

third person that had been stolen; Siegel's proposed "settlement" would have required the plaintiffs to part with $2,000 and the dog Titan to ensure the return of this property. Implicit in Siegel's communications was the proposition Jackie would not be returned unless plaintiffs gave Siegel both Titan and the money, which amounts to a threat to property under the extortion statutes.

Even if Siegel's settlement demand did not rise to the level of extortion, it involved the concealment or withholding of a dog that had been stolen. As the trial court recognized, this amounts to receiving stolen property under Penal Code section 496, itself an independent crime. While *Flatley* dealt in particular with a claim for extortion, it applies more broadly to illegal conduct in general. (*Flatley, supra*, 39 Cal.4th at p. 317.) In light of this "well settled" principle (*Cohen v. Brown* (2009) 173 Cal.App.4th 302, 317), any reasonable attorney would have concluded the anti-SLAPP motion in this case was without merit.[4]

Siegel finally argues the attorney fee award was deficient because the court "failed to recite any detail as to how or why the moving parties conduct justified the order." Because he failed to object on this ground in the trial court, the contention has been forfeited on appeal. (*Baharian-Mehr v. Smith* (2010) 189 Cal.App.4th 265, 275.)

DISPOSITION

The judgment (order awarding attorney fees) is affirmed. Plaintiffs are entitled to recover their costs and attorney fees on appeal, the amount to be determined by the trial court upon a motion by plaintiffs. (*City of Alhambra v. D'Ausilio* (2011) 193 Cal.App.4th 1301, 1309-1310.)

[4] We emphasize that our determination of this issue is preliminary and unrelated to the question (not reached by the trial court in this case) of whether plaintiffs have demonstrated a probability of prevailing on their claim under the second prong of the anti-SLAPP analysis. (*Flatley, supra*, 39 Cal.4th at p. 320; see *Aguilar v. Goldstein* (2012) 207 Cal.App.4th 1152, 1159.) The trial court appropriately noted in its order denying the anti-SLAPP motion that defendants were not precluded from asserting applicable evidentiary privileges in later proceedings in the case.

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Needham, J.

We concur:

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Simons, Acting P.J.

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Bruiniers, J.